Filed 8/9/19 Acqua Vista Homeowners Assn. v. MWI, Inc. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ACQUA VISTA HOMEOWNERS ASSOCIATION, Plaintiff and Respondent, v. MWI, INC., Defendant and Appellant.	D073666 (Super. Ct. No. 37-2009-00104348-CU-CD-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

White & Amundson and Steven G. Amundson for Defendant and Appellant.

Morris, Sullivan & Lemkul, Shawn D. Morris, Matthew J. Yarling; Peters & Freedman, David M. Peters and Kyle E. Lakin for Plaintiff and Respondent.

I.

INTRODUCTION

Code of Civil Procedure section 998[1] was enacted "to encourage settlements." (*Meleski v. Estate of Albert Hotlen* (2018) 29 Cal.App.5th 616, 623.) "The statute ' "achieves its aim by punishing a party who fails to accept a *reasonable* offer from the other party." (Original italics.) [Citation.]' " (*Ibid.*) As relevant to this appeal, section 998, subdivision (c)(1) provides, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award . . . the court . . . in its *discretion*, *may* require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . ." (§ 998, subd. (c)(1), italics added.) "[T]he offer [must] be 'realistically reasonable under the circumstances of the particular case,' and carry with it a reasonable prospect of acceptance. [Citation.]" (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1126 (*LAOSD*).) "Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Ibid.*)

Plaintiff Acqua Vista Homeowners Association (HOA) brought this construction defect action under the Right to Repair Act ("the Act") (Civ. Code, § 895 et seq.) to recover damages against defendant MWI. Prior to trial, MWI made a section 998 offer of $325,000, which the HOA did not accept. During the ensuing jury trial, the trial court interpreted a provision in the Act (Civ. Code, § 936) as permitting the HOA to recover on

---

1 Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

its claim against MWI *without* proving that MWI's negligence or breach of a contract caused a violation of the Act's standards. At the conclusion of the trial, the jury rendered a verdict in favor of the HOA for nearly $24 million, and the trial court entered an initial judgment in favor of the HOA against MWI in accordance with the jury's verdict.

However, in *Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129 (*Acqua Vista I*), we interpreted Civil Code section 936 and concluded that the HOA *was* required to prove that MWI's negligence or breach of a contract caused a violation of the Act's standards. (*Acqua Vista I*, *supra*, at p. 1135.) In reaching this conclusion, we observed that although the provision in section 936 on which the trial court had relied was "not a model of textual clarity," an application of the "standard techniques of statutory interpretation" made clear that this provision did not apply to this case. (*Acqua Vista I*, at p. 1135.) Accordingly, since the HOA had failed to carry its burden of proof under section 936, we reversed the trial court's judgment and directed the trial court to enter judgment in favor of MWI. (*Acqua Vista I*, at p. 1164.)

On remand from *Acqua Vista I*, the trial court entered judgment in MWI's favor in accordance with our directions. MWI subsequently sought to recover various costs from the HOA, including $176,870.54 in expert witness fees pursuant to section 998, subdivision (c)(1). After receiving briefing and hearing argument, the trial court declined to exercise its discretion to permit MWI to recover its expert witness fees from the HOA. In its ruling, the trial court determined that MWI's section 998 settlement offer was a "token offer." In reaching this determination, the court noted that it had considered several factors, including the "amount of MWI's [section] 998 offer" ($325,000), the

HOA's cost to repair the defects related to its claim against MWI ($22,702,373.44), and the trial court's own interpretation of the governing law prior to *Acqua Vista I*.

On appeal, MWI contends that the trial court abused its discretion in refusing to permit it to recover its expert witness fees. MWI argues that it extended a "reasonable offer" to the HOA, and that the trial court "abused its discretion . . . because the court . . . did not think a correct understanding of the law of liability had anything to do with the assessment of the reasonableness of MWI's . . . section 998 offer."

We conclude that the trial court did not abuse its discretion in determining that a settlement offer that amounted to less than two percent of the HOA's potential damages did not amount to a reasonable offer under the circumstances of this case. Accordingly, we affirm the trial court's order.[2]

---

[2] In light of our conclusion, we need not consider the HOA's alternative ground for affirmance, i.e., that MWI's section 998 offer was "procedurally flawed due to MWI's bankruptcy." (Boldface & some capitalization omitted.) The HOA also requested that, in the event this court reversed the order taxing expert costs, we remand the matter for a determination of the reasonableness of the expert fees that MWI incurred. We need not consider this request in light of our affirmance of the order.

II.

FACTUAL AND PROCEDURAL BACKGROUND[3]

A. *The initial pleadings in the case*

The HOA filed this construction defect action in December 2009 against numerous entities (collectively "Developers") involved in developing a condominium complex in downtown San Diego.[4]

In 2011, the HOA filed a second amended complaint that included a cause of action for "[v]iolation of SB800[5] Construction Standards, Civil Code § 896." The second amended complaint alleged various deficiencies in the condominium complex, including defects related to its plumbing and mechanical systems. The HOA named MWI as a defendant to the second amended complaint in August 2011. MWI supplied pipe used in the construction of the complex.

---

3 We take judicial notice of our opinion in *Acqua Vista I*, sua sponte. (See Evid. Code, §§ 459 ["The reviewing court may take judicial notice of any matter specified in [Evidence Code] Section 452 "], 452, subd. (d) [permitting a court to take judicial notice of the "[r]ecords of (1) any court of this state"].) Portions of our factual and procedural background are drawn from the opinion in *Acqua Vista I*.

Other portions of this section are based on the declaration of Attorney David M. Peters, which the HOA offered in support of its motion to tax costs. The clerk's transcript does not contain the exhibits referenced in Peters's declaration.

4 The initial complaint is not contained in the clerk's transcript. In addition, although it is not entirely clear from Peters's declaration that the initial complaint was filed against the Developers, that appears to be the case.

5 SB800 refers to the Act, which was initially adopted in 2002 pursuant to Senate Bill No. 800 (Stats. 2002, ch. 722, § 3.) Thus, references to "SB800" in this opinion are references to the Act.

B. *MWI's section 998 offer*

On March 21, 2013, MWI offered to settle the HOA's claims against it for $325,000 pursuant to a section 998 offer to compromise. The HOA did not accept the offer.

C. *The HOA's settlement with the developers*

In September 2013, after the HOA reached a settlement with the Developers that included monetary payments totaling $21,500,000,[6] the trial court granted the HOA's motion seeking a determination that the settlement had been reached in good faith.

D. *The operative complaint, the trial, and the jury's verdict*

Also in September 2013, the HOA filed a third amended complaint. As relevant to this appeal, the third amended complaint contained an SB800 cause of action against MWI and another supplier of pipe to the project, Standard Plumbing & Industrial Supply Co. ("Standard"). The SB800 cause of action alleged that "[d]efective cast iron pipe manufactured in China and used throughout the building" constituted a violation of standards specified in the Act.

The trial court held a jury trial on the HOA's claims under the Act against MWI and Standard. At trial, the HOA presented evidence that the pipes contained manufacturing defects, that they leaked, and that the leaks had caused damage to various parts of the condominium development.

---

6 The record is unclear as to when the settlement occurred and whether it pertained to claims based on defects in the piping or other alleged defects or both.

During that trial, near the close of evidence, MWI filed a motion for a directed verdict on the ground that the HOA failed to present any evidence that MWI's negligence or breach of contract had caused a violation of the Act's standards, as MWI contended was required. The trial court denied the motion, concluding that the HOA was not required to prove that any violations of the Act's standards were caused by MWI's negligence. In reaching this conclusion, the court relied on the final sentence of a provision in the Act (Civ. Code, § 936), which states in relevant part, "[T]he negligence standard in this section does not apply to . . . material supplier[s] . . . with respect to claims for which strict liability would apply." (*Ibid.*)

The jury rendered a verdict against MWI and Standard and found that the HOA had suffered $26,038,909 in damages. The jury further found that MWI was responsible for 92 percent of the total damages.

E. *The initial judgment*

The trial court entered a judgment against MWI in March 2015 in the amount of $23,955,796.28, reflecting MWI's 92 percent responsibility.[7]

F. *Acqua Vista I*

On appeal, this court reversed that judgment and directed the trial court to enter judgment in favor of MWI. (*Acqua Vista I, supra,* 7 Cal.App.5th at p. 1164.) In reaching this result, we concluded that Civil Code section 936 in fact required the HOA to prove that MWI's negligence or breach of contract had caused a violation of the Act's standards,

---

7 Prior to the entry of judgment, the HOA and Standard entered into a settlement.

notwithstanding the final sentence of that provision. (*Acqua Vista I*, *supra*, at p. 1135.) We explained that the *first* sentence of Civil Code section 936, when read in context with another provision of the Act, "clearly and unambiguously states that a homeowner/claimant (such as the HOA) suing a material supplier (such as MWI) for violating a standard under the Act must prove that the material supplier caused, in whole or in part, a violation of a standard *as the result of a negligent act or omission or a breach of contract*. (See [Civ. Code,] § 936 [stating that provisions of the Act outside of ch. 4, including [Civ. Code,] § 896, apply to 'material suppliers, . . . to the extent that the . . . material suppliers . . . caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract'].)" (*Acqua Vista I*, at p. 1142.) We explained that, although the plain language of the *final* sentence of Civil Code section 936 was "ambiguous,"[8] "an application of the techniques of statutory interpretation demonstrates that the provision should be interpreted as providing that the negligence standard specified in the first sentence of section 936 does *not* apply to *common law strict liability* claims against the specified nonbuilder entities." (*Acqua Vista I*, at p. 1143.)[9]

---

8 As noted previously, the final sentence of Civil Code section 936 provides, "However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply."

9 As noted in the text, since the HOA was asserting a claim *under the Act*, the *Acqua Vista I* court concluded that the HOA was required to have demonstrated MWI's negligence or breach of contract in order to prevail. (*Acqua Vista I*, *supra*, 7 Cal.App.5th at p. 1135.)

In interpreting the statute in this manner, the *Acqua Vista I* court "adhere[d]" (*Acqua Vista I*, *supra*, 7 Cal.App.5th at p. 1153) to this court's prior decision in *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194 (*Greystone*) construing section 936. However, the *Acqua Vista I* court acknowledged that the *Greystone* court had not "discuss[ed] the final sentence of section 936," (*Acqua Vista I, supra*, at p. 1155) and observed, as noted above, that the final sentence of Civil Code section 936 was not a "model of textual clarity." (*Acqua Vista I*, at p. 1135.)

G. *The judgment on remand and MWI's cost memorandum*

After the issuance of the remittitur in *Acqua Vista I*, the trial court entered a judgment in favor of MWI in June 2017.

That same month, MWI filed a memorandum of costs, seeking $298,178.69 in costs, including $176,870.54 in expert witness fees.

H. *The HOA's motion to tax costs*

The HOA filed a motion to tax costs and filed a memorandum in support of its motion. The HOA maintained that the trial court should exercise its discretion to deny MWI's request to recover $176,870.54 in expert witness fees under section 998, subdivision (c)(1), among other arguments. The HOA argued that, in order for MWI to recover such fees under section 998, MWI's settlement offer had to have had a

---

The *Acqua Vista I* court further concluded that since "there is no evidence in the record that MWI caused a violation of the Act's standards through its negligence or breach of contract, the [trial] court erred in denying MWI's motion for a directed verdict . . . ." (*Ibid.*)

" 'reasonable prospect of acceptance.' " The HOA argued that MWI's offer had not borne a reasonable prospect of acceptance for various reasons, including the following:

> "When MWI made its $350,000[10] [section] 998 offer to [the HOA], [the HOA's] cost of repair estimate for defective iron pipes (93% of which were MWI's pipes) was approximately $22,702,373.44. Acqua Vista was awarded $23,955,796.28 in damages against MWI. A [section] 998 offer in the amount of only 1.5 % of the cost of repair estimate for the subject defect, and only 1.4% of the amount that a jury saw fit to award against MWI, should be deemed a 'token' offer, with no 'reasonable prospect of acceptance'' and therefore cannot serve as a basis for imposing MWI's exorbitant expert bill on [the HOA]."

I. *MWI's opposition*

MWI filed an opposition in which it argued that its section 998 offer was reasonable and that the HOA's contention to the contrary was "nonsensical." In support of this contention, MWI argued that the HOA "knew or should have known that it was the plaintiff's burden, in pursuit of the case, against MWI, to demonstrate that MWI was negligent." MWI argued further that the HOA should have been on notice of this burden, given the language of the applicable statute (Civ. Code, § 936), and this court's prior decision in *Greystone* construing the statute.

J. *The HOA's reply*

The HOA filed a reply in which it argued that it reasonably believed that it would not be required to prove that MWI had been negligent in order for the HOA to prevail on its claim against MWI under the Act. The HOA argued in relevant part:

---

10 As noted elsewhere in HOA's memorandum, MWI's offer was actually for only $325,000.

> "Lastly, [the HOA] and this very Court reasonably believed [the Act], as applied to MWI did not require [the HOA] to prove a negligent act by MWI in order for Acqua Vista to recover damages against MWI for violation of the SB800 standards. . . . The issue, which ultimately was decided by the Court of Appeal [in *Acqua Vista I*], hinged on whether Civil Code [section] 936 required Acqua Vista to prove that a violation of the SB800 standards resulted from a negligent act by MWI."

K. *The trial court's order granting the HOA's motion to tax costs*

After hearing oral argument on the motion, the trial court granted the HOA's motion to tax costs insofar as MWI sought to recover expert witness fees as costs under section 998, subdivision (c)(1).[11] After outlining the case law pertaining to determining the reasonableness of section 998 offers, the trial court exercised its discretion to deny MWI's recovery of its expert witness fees under the statute. The court reasoned in part:

> "The evidence before the court is that, at the time of MWI's offer [of $325,000], [the HOA's] cost of repairing and replacing all of the cast iron pipe at Acqua Vista was $22,702,373.44.
>
> "The court considers the amount of MWI's [section] 998 offer and [the HOA's] cost of repair and the absence of evidence that [the HOA] knew of MWI's financial condition and coverage issues at the time the offer was made.[12] The court also considers the amount of the verdict, this court's interpretation of the law prior to the opinion in [(*Acqua Vista I*)], the opinion in [(*Acqua Vista I*)] and that

---

11 The trial court also granted the HOA's motion to tax costs with respect to several other costs and denied the HOA's motion to tax costs, in part. However, MWI's appeal pertains solely to the trial court's granting of the HOA's motion to tax costs in the amount of $176,870.54 related to expert witness fees.

12 In its opposition to the HOA's motion to tax costs, MWI also argued that its section 998 offer was reasonable because the HOA knew that "MWI was out of business," and that "insurance coverage for any possible judgment which might be obtained against MWI was highly doubtful." MWI does not rely on these arguments on appeal.

> judgment was eventually entered in favor of MWI and against [the HOA]. With these considerations, the court, exercising its discretion[,] finds [the HOA] establishes MWI's offer as a token offer that does not satisfy the requirements of [section] 998."

L. *The appeal*

MWI appeals the trial court's October 13, 2017, order.

III.

DISCUSSION

The trial court did not abuse its discretion in declining to permit MWI to recover its expert witness fees from the HOA

MWI contends that the trial court abused its discretion in declining to permit MWI to recover its expert witness fees from the HOA.

A. *Standard of review*

The law is well settled that a trial court's ruling on a request for expert fees under section 998, subdivision (c)(1) is reviewed for an abuse of discretion. (*LAOSD*, *supra*, 25 Cal.App.5th at p. 1126.) More specifically, "Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Ibid.*)

In addition, as MWI properly acknowledges in its brief on appeal, a defendant "assert[ing] the trial court abused its discretion in denying an award of expert witness fees," bears the burden of establishing that the trial court abused its discretion in determining that its section 998 offer was unreasonable. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338, 339, and fn. 4 (*Thompson*).) A reviewing court "will not substitute [its] opinion for that of the trial court unless the trial court clearly abused its discretion, resulting in a miscarriage of justice." (*Id.* at p. 339.)

B. *Governing law*

"[W]hen a party obtains a judgment more favorable than its pretrial offer, [the offer] is presumed to have been reasonable and the opposing party bears the burden of showing otherwise. [Citation.]" (*Thompson, supra,* 112 Cal.App.4th at pp. 338–339.) However, " '[t]o effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be "realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement . . . ." [Citation.] The offer "must carry with it some reasonable prospect of acceptance. [Citation.]" [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]' [Citations.]" (*People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1271.)

In *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1485 (*Adams*), the court summarized the case law concerning the determination of the reasonableness of a section 998 offer as follows:

> "[A] reasonable section 998 settlement offer is one that 'represents a reasonable prediction of the amount of money, if any, [the offeror] would have to pay [the offeree] following a trial, discounted by an appropriate factor for receipt of money by [the offeree] before trial.' [Citation.] The reasonableness of a defendant's section 998 settlement offer is evaluated in light of 'what the offeree knows or does not know at the time the offer is made,' along with what the offeror knew or should have known about facts bearing on the offer's reasonableness. [Citation.] In other words, for a section 998 offer to be reasonable, the defendant must reasonably believe that the plaintiff might accept his offer, and the plaintiff must have access to

> the facts that influenced the defendant's determination that the offer was reasonable."

Courts have also suggested that reasonableness is best measured by "how well [the offer] approximates the amount the party will have to pay *if found liable*," after "discount[ing] for the probability of success of the claim . . . ." (*Thompson, supra,* 112 Cal.App.4th at p. 339, italics added.) Thus, even where the prospect of liability is "tenuous," where a defendant faces "enormous exposure," a trial court does not abuse its discretion in denying the recovery of expert witness fees. (*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 63 (*Pineda*).) On the other hand, " 'Even a modest or "token" offer may be reasonable if an action is *completely lacking in merit*.' " **(***Bates v. Presbyterian Intercommunity Hospital, Inc.* (2012) 204 Cal.App.4th 210, 220 (*Bates*), italics added.)

C. *Application*

In its order denying MWI the recovery of expert fees, the trial court outlined a number of relevant factors, including both the amount of MWI's settlement offer ($325,000) and the HOA's potential damages as of the time of the offer ($22,702,373.44). The trial court also alluded to the uncertainty in the law with respect to the elements that the HOA would have to prove in order to prevail at trial by referring to the trial court's "interpretation of the law prior to the opinion in [*Acqua Vista I*]." Further, the trial court implicitly and reasonably rejected MWI's suggestion that the HOA's action was "completely lacking in merit," (*Bates, supra,* 204 Cal.App.4th at p. 220), noting the amount of the jury's verdict in the case.

Thus, even assuming that MWI's potential liability could be said to have been "tenuous" at the time of the offer (*Pineda, supra,* 112 Cal.App.3d at p. 63)—in light of the text of section 936 and our decision in *Greystone*—given MWI's "enormous exposure," (*Pineda, supra,* at p. 63) and the lack of case law definitively interpreting the final sentence of section 936 prior to *Acqua Vista I,* we cannot say that the trial court abused its discretion in determining that MWI's section 998 offer was a token one that bore little prospect of acceptance.

MWI's arguments to the contrary are not persuasive. MWI suggests that its offer was reasonable, contending that the HOA would not prevail on its claim against MWI since the HOA was "obligated to establish liability with evidence of negligence," and the HOA "never had such evidence." This argument is unpersuasive since the reasonableness of an offer is determined " 'at the time the offer is made,' " (*Adams, supra,* 199 Cal.App.4th at p. 1485), and, at the time MWI's offer was made (i.e., prior to *Acqua Vista I*), it was not clear that the HOA would be required to establish negligence in order to prevail against MWI.

We also disagree with MWI's characterization of the trial court's ruling as stating that MWI's settlement offer was unreasonable "on the grounds that neither offeree HOA [n]or the trial court itself understood the law of liability in effect at the time of the offer . . . ." The trial court's ruling is most reasonably interpreted as stating merely that the trial court was taking into consideration the uncertainty in the law in evaluating the reasonableness of MWI's settlement offer.

Nor do we agree with MWI's assertion that the trial court found its settlement offer to be unreasonable because "MWI . . . kept secret the governing established law applicable to its potential recovery against MWI." The trial court recognized that the reasonableness of a settlement offer depends on information that the plaintiff knew or reasonably should have known (quoting *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699–700), and applied this principle in rejecting MWI's contention that the HOA knew that MWI was out of business and was unlikely to have insurance coverage available for the HOA's claims. The court did *not* state that MWI had a duty to inform the HOA of the law governing its claim under the Act.

Finally, *Thompson*, on which MWI heavily relies in its brief, is clearly distinguishable. In *Thompson*, the plaintiffs alleged that the defendants had committed various torts in "convincing plaintiffs to sell their shares" in a closely held corporation. (*Thompson*, *supra*, 112 Cal.App.4th at p. 329.) The "[d]efendants made a pretrial offer of settlement, proposing to pay plaintiffs an amount *within the approximate range defendants would have been required to pay if they had not prevailed*." (*Id.* at p. 330, italics added.) The *Thompson* court concluded that, under these circumstances, the trial court had abused its discretion in denying an award of expert fees. (*Id.* at p. 338.) The *Thompson* court reasoned:

> "Here, $300,000 *was within the approximate range for which defendants could have been found liable*. Each plaintiff would have reaped a gain of more than five times the initial investment in [the company]. Furthermore, it exceeded the alleged underpayment . . . based on the value, at the time of sale, that plaintiffs' own expert placed on the stock. Plaintiffs had this information; nevertheless,

> they declined the offer. This was not a token offer. It was generous." (*Id.* at p. 339, italics added.)

In this case, in contrast, $325,000 represented than less two percent of the HOA's potential damages. MWI's offer was not, as in *Thompson*, "within the approximate range [MWI] would have been required to pay if [it] had not prevailed." (*Thompson, supra,* 112 Cal.App.4th at p. 330.) *Thompson* thus does not demonstrate that the trial court abused its discretion in determining that MWI's settlement offer was unreasonable.

Accordingly, we conclude that the trial court did not abuse its discretion in declining to permit MWI to recover its expert witness fees from the HOA.

IV.

DISPOSITION

The October 13, 2017 order is affirmed. MWI is to bear costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.